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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

DEMETRIX A. BROWN, Plaintiff and Appellant, v. STATE PERSONNEL BOARD, Defendant; DEPARTMENT OF CORRECTIONS AND REHABILITATION, Real Party in Interest and Respondent.	C086625 (Super. Ct. No. 34-2016-80002506-CU-WM-GDS)

Demetrix A. Brown appeals from the denial of her petition for a writ of mandate to overturn the decision of the State Personnel Board (Board) approving the settlement of her appeal from her dismissal from the Department of Corrections and Rehabilitation (Department). Brown contends she was denied due process, the settlement agreement is invalid, and the pre-hearing settlement conference was flawed.

A review of the record reveals that Brown entered into a valid and enforceable settlement agreement under which she waived her right to a due process hearing under *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194 (*Skelly*) or to otherwise challenge her dismissal. Accordingly, we affirm the denial of the petition for a writ of mandate.

BACKGROUND

Brown began working as an associate governmental program analyst with the Department's Office of Legal Affairs in June 2013. In April 2014 she was placed on administrative time off pending service of a notice of adverse action (Notice). The Notice was served in mid-July 2014; it stated she was dismissed effective July 24, 2014, due to fraud in securing the appointment, dishonesty, and other failure of good behavior. The Notice set forth Brown's appeal rights, both the right to respond to the Notice under the *Skelly* rule and the right to appeal to the Board.

Brown appealed her dismissal to the Board. She retained the services of the law firm Goyette & Associates to represent her in her appeal. She met with attorney Daniel Thompson about her case but he later notified her that due to his heavy trial schedule, her case was reassigned to attorney Richard Fisher. Fisher had previously worked at the Department and had been an administrative law judge (ALJ) for the Board.

At the October 2014 pre-hearing settlement conference, Brown was represented by Fisher and the Department was represented by Amy Hurn, a manager. The parties reached a settlement, memorialized by a series of stipulations. Under the settlement, Brown voluntarily resigned from the Department effective August 15, 2014, and agreed to never apply for or accept employment with the Department. The Department agreed to withdraw the Notice and to remove from Brown's personnel file all documents relating to the Notice except the settlement agreement. Brown waived her right to appeal from the Notice and released the Department from all claims under the Fair Employment and Housing Act, Title VII of the 1964 Civil Rights Act, and the Age Discrimination in Employment Act. She agreed not to file any charge, complaint, claim or grievance

arising out of or related to her employment with the Department. She waived the protection of Civil Code section 1542 regarding the scope of a general release.

At the hearing, the ALJ read the settlement agreement into the record. Fisher indicated he had apprised Brown of its terms and Brown stated she had entered into the settlement agreement freely and voluntarily.

The Board approved the settlement. It was satisfied the parties voluntarily agreed to the disposition and that the stipulation was in accordance with *Pamela Martin* (1991) SPB Dec. No. 91-03 [1991 WL 11003002].[1] The caption of both the decision approving the settlement and the stipulations of the settlement indicated the settlement was "from dismissal."

Brown sought unemployment insurance benefits which were denied upon a finding that she was terminated for misconduct. This decision was ultimately upheld after Brown's petition for a writ of mandate was granted and the matter remanded to the Unemployment Insurance Appeals Board.

In December 2016, over two years after the Board approved the settlement, Brown petitioned for a writ of mandate seeking reinstatement with the Department, and back pay and other benefits. Brown's arguments in support of the petition challenged both her dismissal and the settlement agreement. She also raised the issue of her disability and the lack of accommodation for the disability during the investigative interview.

The trial court denied Brown's petition. It found Brown failed to show the settlement agreement was invalid, unenforceable, or unconscionable. The settlement agreement barred Brown's challenge to her termination and the merits of the Department's actions were not before the court. The court noted that under Government Code section 19680 a petition for a writ challenging the Board's decision must be made

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[1] As discussed *post*, the *Pamela Martin* decision prohibited "muzzle clauses" in settlement agreements.

within six months of the final decision of the Board, but found it need not determine timeliness in this case.

Brown appealed. As she did in the trial court, Brown is representing herself on appeal. Her status as a party appearing in propria persona does not provide a basis for preferential consideration. A party proceeding in propria persona "is to be treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys." (*Barton v. New United Motor Manufacturing, Inc*. (1996) 43 Cal.App.4th 1200, 1210.)

DISCUSSION

I

Standard of Review

"Trial court review of an administrative decision is governed by Code of Civil Procedure section 1094.5. Subdivision (b) of section 1094.5, limits the court's inquiry 'to the questions whether the [administrative tribunal] has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion.' In determining whether there was an abuse of discretion, the reviewing court considers whether the administrative tribunal proceeded in the manner required by law, whether its order or decision is supported by the findings, and whether the findings are supported by the evidence. (*Ibid*.)

"Because the [Board] is vested with quasi-judicial powers, the trial court may not exercise its independent judgment, but must uphold the Board's findings if they are supported by substantial evidence. In applying the substantial evidence test, the trial court must examine all relevant evidence in the entire record, considering both the evidence that supports the Board's decision and the evidence against it, in order to determine whether that decision is supported by substantial evidence. [Citations.] This does not mean, however, that a court is to reweigh the evidence; rather, all presumptions are indulged and conflicts resolved in favor of the Board's decision. [Citation.]

"These standards 'do not change on appellate review from a trial court's denial of a petition for writ of mandate from a decision of the [Board]; an appellate court independently determines whether substantial evidence supports the [Board's] findings, not the trial court's conclusions.' [Citation.] However, insofar as an appeal from an administrative mandamus proceeding presents questions of law, our review is de novo. [Citation.]" (*Telish v. State Personnel Bd.* (2015) 234 Cal.App.4th 1479, 1487.)

II

Denial of Due Process

Brown contends she was denied due process because she was not given a *Skelly* hearing to respond to her dismissal. In *Skelly*, our high court held "the California statutory scheme regulating civil service employment confers upon an individual who achieves the status of 'permanent employee' a property interest in the continuation of his employment which is protected by due process." (*Skelly*, *supra*, 15 Cal.3d at p. 206.) Due process required pre-removal safeguards of "notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline." (*Id.* at p. 215.)

Section V of the Notice notified Brown of the *Skelly* rule and her right to respond to the notice. It also told her of her right to appeal to the Board. Brown did appeal to the Board but before an evidentiary hearing could be held, she agreed to a settlement and the Board approved it.

Government Code section 18681 provides: "Whenever any matter is pending before the board involving a dispute between one or more employees and an appointing power and the parties to such dispute agree upon a settlement or adjustment thereof, the terms of such settlement or adjustment may be submitted to the board, and if approved by the board, the disposition of the matter in accordance with the terms of such adjustment or settlement shall become final and binding upon the parties."

A public employee may waive her right to due process. (*Flippin v. Los Angeles City Bd. of Civil Service Commissioners* (2007) 148 Cal.App.4th 272, 281.) The settlement agreement provided that the Department would withdraw the Notice and Brown would withdraw any appeal from the Notice. The settlement expressly provided that Brown waived "any rights she may have as set forth in section V of the Notice; and Code of Civil Procedure, Part 3, title 1, sections 1067 through 1110b, inclusive [regarding writ review]." Brown expressly waived her right to a *Skelly* hearing or other due process rights to challenge her dismissal in the settlement agreement.

Brown contends she did not waive her due process rights, citing to *Walls v. Central Contra Costa Transit Authority* (9th Cir. 2011) 653 F.3d 963. In *Walls,* a bus driver was terminated from employment and then reinstated upon signing a last chance agreement. After an unexcused absence, he was again terminated. He brought suit, claiming his termination violated the Family Medical Leave Act (FMLA) and his due process rights to a pre-termination hearing. (*Id.* at p. 966.) The Ninth Circuit found Walls was not an employee when he requested leave so he could not invoke the protection of FMLA and turned to the dispositive question of whether Walls waived his right to a pre-termination hearing by signing the last chance agreement. (*Id.* at pp. 967, 969.) The court focused on the presumption against the waiver of fundamental rights and the need for a knowing and voluntary waiver. (*Id.* at p. 969.) The last chance agreement contained no express waiver of a pre-termination hearing. The provision that noncompliance with its terms would result in immediate and final termination was insufficient to constitute a waiver because the term "immediate" did not signal that termination would occur without a hearing and it was not clear Walls knew and understood he was waiving his right to a hearing by signing the agreement. (*Ibid*.)

Walls is distinguishable from the instant case. Here, as set forth *ante*, the settlement agreement contained an express waiver of the right to a *Skelly* hearing and other due process rights. At the settlement conference, Brown's attorney told the ALJ he

had apprised Brown of the terms of the agreement and Brown affirmed she had entered into the agreement freely and voluntarily. The record establishes a knowing and voluntary waiver of Brown's due process rights.

III

Validity of Settlement Agreement

Brown raises a number of what she calls "flaws" in the settlement agreement. At times her argument is difficult to understand. We try to address the points that affect the validity of the agreement.

A. *Representation*

Brown appears to contend that Fisher was not a proper representative for her at the settlement conference. First, she contends she did not hire a law firm, but hired attorney Thompson. The record is to the contrary. The fee agreement shows it is between Brown and Goyette & Associates, Inc., referred to as "Attorney" or "the firm." She next contends she "was not aware of the issues with Richard Fisher and Gregory Brown [the ALJ] and they did not disclose there may be an appearance of impropriety." We assume Brown is suggesting that because Fisher had formerly been an ALJ for the Board and presumably knew Gregory Brown, it was somehow improper for Fisher to represent a client before ALJ Brown. Brown cites no authority for this proposition and nothing in the record indicates any impropriety. Brown complains that Fisher was not with the Goyette firm when she hired the firm. The record indicates Fisher was with the firm when he represented Brown. Brown fails to explain why she could not be represented by a newly hired attorney, nor did she object to his representation at the settlement conference.

B. *Muzzle Clause*

Brown raises the issue of a "muzzle clause." In the precedential *Pamela Martin* decision, the Board prohibited the inclusion of a "muzzle clause" in a settlement agreement. In *Pamela Martin,* a state employee was dismissed after serious allegations

of theft. Under the proposed settlement, the employee agreed to voluntarily resign and not seek further employment with the same department. The settlement agreement also provided for full disclosure of the circumstances of Martin's separation to other facilities in that department, but that other prospective employers, including state agencies, would be told only that she voluntarily resigned. The Board found this "muzzle clause" concealed relevant information and adversely affected other State employers and applicants for State employment and therefore disapproved the settlement. (*In re Pamela Martin, supra,* S.P.B. Dec. 91-03 [1991 WL 11003002 at *2.].)

The settlement agreement here does not contain a "muzzle clause." Indeed, in approving the settlement, the Board expressly found the agreement was in compliance with *Pamela Martin*. It appears that Brown's real contention is that the settlement agreement is not that beneficial to her because while she is permitted to resign and have the Notice removed, a prospective employer is still able to discover through access to her file that she was dismissed.

The Board considered the effect of a settlement agreement under which an employee agrees to resign in exchange for the withdrawal of a notice of adverse action in *In re Richard C. Toby* (2001) S.P.B. Dec. 01-04 [2001 WL 34059260]. Years after Toby entered into such a settlement agreement, he applied for another state job. As part of the application process, he answered "no" to the question asking if he had resigned or quit a position while under investigation or after being informed discipline would be taken against him, or during an appeal from disciplinary action. Because he answered "no," his past employment was not investigated. After he was hired, his employer requested his prior personnel file and eventually learned of the notice of adverse action. The employer determined Toby had lied on his application and dismissed him. Government Code section 18935, subdivision (i) permits the Board to declare ineligible for examination anyone who resigned from a position to avoid dismissal. The Board found that to give an employee the benefit of his bargain of the settlement, once a disciplinary or rejection

action has been withdrawn, an applicant for future state employment should not have to disclose it on the application, but should be able to get a "foot in the door" by listing resignation as the reason for leaving prior employment. (*Toby*, at p. *6.) But this nondisclosure did not mean the adverse action ceased to exist; it remained as part of the employee's work history record, would be disclosed by department officials upon inquiry, and the applicant was expected to disclose it if specifically questioned about his employment history. At that point, the applicant has a "foot in the door" and the opportunity to explain the circumstances surrounding the prior action. (*Id.* at pp. *7-*8.)

Brown appears to argue the settlement agreement offers her only an illusory benefit. She claims that she is unable to get another job because the Department tells prospective employers that she was dismissed. But, as the Board explained in *In re Richard C. Toby*, the settlement agreement advances her beyond a blanket rejection under Government Code section 18935, subdivision (i). She may list resignation as her reason for leaving the Department and if the Notice comes to light upon additional questioning or future investigation, at that point she has a "foot in the door" and the opportunity to explain the circumstances.

C. *No Re-Hire Clause*

Brown contends the settlement agreement is unenforceable because it contains a no-hire clause. Brown agreed never to apply for or accept employment with the Department. She cites to *Golden v. California Emergency Physicians Med. Grp.* (9th Cir. 2018) 896 F.3d 1018. In *Golden*, a doctor was fired by a large medical group (CEP) and sued claiming he was fired due to his race. After a settlement conference, the parties agreed to settle the case but the doctor later refused to sign the agreement. He objected to a provision in the agreement that barred his working at CEP, any facility owned or managed by CEP, or any facility CEP contracts to provide services to or acquires rights in, claiming it was an unlawful restraint on his practice of medicine in violation of Business and Professions Code section 16600. The Ninth Circuit found this provision

substantially restrained the doctor's practice of medicine in violation of California law. (*Golden*, at p. 1024.) The ban on future employment at CEP was only a minimal restraint, but the interference with the doctor's ability to seek or maintain employment with third parties rose to the level of a substantial restraint due to the size of CEP's business in California. It staffed 160 facilities and handled 25 to 30 percent of emergency room admissions, and its business was growing. (*Id.* at p. 1026.)

Golden does not aid Brown because she has failed to present any evidence that barring her from working at the Department substantially restrained her practice of a profession, business, or trade. Brown failed to present evidence as to what her profession is or that the Department is the dominant employer for that profession, as was the case in *Golden*.

D. *Violation of Public Policy*

Brown contends the settlement agreement violates public policy because it required her to release any claims under the Fair Employment and Housing Act, Title VII of the 1964 Civil Rights Act, and the Age Discrimination in Employment Act. She argues, "No agreement between employee and employer can limit one's right to testify, assist, or participate in an investigation, hearing, or proceeding conducted by EEOC under the ADEA, Title VII, the ADA, or the EPA. Any provision in a waiver that attempts to waive these rights is invalid and unenforceable."

Brown misconstrues the provisions of the settlement agreement. They do not prohibit her assistance or participation in any proceedings conducted by the EEOC. Rather, under the settlement agreement she releases any claim relating to the Notice that she may have under the specified laws. Brown has not shown that this release of claims related to the Notice is unenforceable.

E. *Americans with Disabilities Act*

Brown contends that she was denied a reasonable accommodation for her disability during the investigative interrogation by the Department. Brown provided no evidence of her disability or the need for a reasonable accommodation. She did not submit an affidavit, declaration, or other evidence attesting to her disability. Based on the disorganized representations in her briefing both in the trial court and on appeal, we surmise that Brown suffered a traumatic event in the past for which she takes medication and receives eye movement and desensitization and reprocessing (EMDR) treatment. Apparently, the investigators did not believe EMDR was a bona fide treatment and believed her problems in responding to their questions were evidence of her dishonesty.

This claim does not go to the validity of the settlement agreement. Instead, Brown seeks to challenge the actions of the Department in dismissing her. As the trial court noted, the merits of the Department's actions are not before us. Unless and until Brown can set aside the settlement agreement, she has released or waived any claim as to the merits of the Department's actions. Brown has failed to show the settlement agreement is invalid.

IV

Pre-Hearing Settlement Conference

In a very confusing argument, Brown contends it was error to find there was no pre-hearing settlement conference. There was a brief settlement conference consisting of reading the parties' stipulations for settlement and assuring that Brown's lawyer had advised her of the agreement and that Brown entered into the agreement freely and voluntarily. It appears Brown misunderstood the trial court's ruling that she did not have an evidentiary hearing; Brown thought the ruling was erroneous, because she did indeed have a settlement conference. But she did not have an evidentiary hearing; she was not entitled to one, because she settled the case. As explained *ante*, by settling, Brown

waived her due process rights, including the right to challenge the Department's actions through an evidentiary hearing or any other means.

Brown also objects to the representation at the settlement conference. We have discussed and rejected her concerns about her counsel, Richard Fisher. Brown also contends that the Department's manager, Amy Hurn, was not authorized to represent the Department. In any hearing before the Board, "[a]ny party may be represented by counsel or any other person or organization of the party's choice." (Cal. Code Regs., tit. 2, § 52.9(a).) The Department was free to choose a manager to represent it at the hearing.

Brown has shown no error in the settlement conference that invalidates the settlement agreement.

V

Timeliness

Government Code section 19680 requires that a petition for a writ challenging the Board's decision must be made within six months of the final decision of the Board. Here, Brown filed her petition over two years after the Board approved the settlement. The trial court did not decide timeliness. Brown did not address the issue in her opening brief. The Department argued in its responsive brief that the writ petition was time-barred. In her reply brief, Brown contends this case involves the same issues as her proceeding against the Unemployment Insurance Appeals Board. Although she invokes collateral estoppel, she appears to argue equitable tolling applies in this case. The Department had no opportunity to respond to the equitable tolling argument.

Because the parties have not fully briefed this issue, and because we have resolved the issues presented without regard to the timeliness of the writ petition, we too decline to decide timeliness.

DISPOSITION

The judgment is affirmed.

/s/
Duarte, J.

We concur:

/s/
Robie, Acting P. J.

/s/
Renner, J.